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No. 85-1931 (2)

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1985

VINOD C. PATWARDHAN,
Petitioner,

vs.

SAN ANTONIO COMMUNITY HOSPITAL,
a Non-Profit Corporation,
Respondent.

BOARD OF TRUSTEES OF SAN ANTONIO
COMMUNITY HOSPITAL and DOES 1 THROUGH 100,
Real Parties in Interest.

BRIEF OF RESPONDENT AND REAL PARTY IN INTEREST IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL

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QUESTIONS PRESENTED

1. Whether the United States Supreme Court has jurisdiction to review the denial of a physician's application for hospital staff privileges based upon the allegation that a private hospital's denial of the application involved State Action affecting a liberty or property right protected by the federal Constitution.

2. Whether the Petitioner's assertions of denial of federal Constitutional protections may be presented originally to the United States Supreme Court when they were not raised before or ruled upon by the California courts.

3. Assuming a physician has a Constitutionally protected interest in whether he may practice at a hospital, whether Due Process:

   A. requires a hospital to allow a physician to be represented by retained counsel at the hearing on his application denial and

   B. forbids a hospital from using its legal counsel as a hearing officer at the board of trustees's review of the hearing committee's decision.

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I

INTRODUCTION

Respondent, San Antonio Community Hospital, and Real Party in Interest, the Board of Trustees of San Antonio Community Hospital, respectfully request that the Court deny Petitioner's Petition for Writ of Certiorari to review the California Court of Appeal decision entered October 22, 1985.

A. JURISDICTION

Petitioner has improperly attempted to invoke jurisdiction under 28 U.S.C. Section 1257(3). The Court lacks jurisdiction to review the California appellate court's decision because the

case does not involve any federal Constitutional rights or federal questions.

II
STATEMENT OF THE CASE

The lawsuit which is the subject of this appeal arises out of the decision of San Antonio Community Hospital ("Hospital") to deny Petitioner's, Vinod C. Patwardhan's, third medical staff application to practice at the Hospital. Petitioner has attempted several times to secure privileges to treat his patients at the Hospital. The first application, submitted in 1976, was denied and Petitioner did not appeal the denial.

The second application, submitted in 1979, was also denied. Petitioner appealed this denial and was given a hearing before the Hospital's Judicial Review Committee. The committee conducted a hearing and in November, 1979, upheld the denial of privileges. Petitioner sought appellate review of this decision by the Hospital Board of Trustees. However, Petitioner chose not to attend the appellate review hearing he had requested and instead elected to protest the decision with a "fast unto death." Petitioner conducted his protest in the Hospital, while the Board of Trustees reviewed the record. The Board of Trustees then affirmed the denial of Petitioner's request for privileges.

Petitioner submitted a third application in February 1981. The Hospital initially refused to process the application, but did so after Petitioner secured a court order requiring the Hospital to review the application.

A careful review of the application was conducted, which included verification of the reference information, interviews with the Credentials Committee, and reviews by the Credentials and Executive Committees. As a result of the review, the Credentials and Executive Committees both recommended denial of the application on the grounds that Petitioner was not competent. Petitioner challenged this decision and was afforded a hearing before a Judicial Review Committee consisting of five physicians. The Medical Staff was represented by two physician representatives and Petitioner was encouraged to secure his own physician representative, but was not allowed to have a lawyer present during the hearing. Petitioner was

informed that this decision did not affect his right to consult with an attorney to prepare for the hearing and he was assisted by an attorney in presenting pre-hearing objections. The hearing was presided over by a hearing officer, Jesse Miller, Esq. After a long hearing, the hearing committee affirmed the denial of privileges.

Petitioner appealed this decision to the Board of Trustees, which appointed an appellate review panel of Trustees to review the decision. The Hospital's legal counsel, Ms. Suzanne West, served as the hearing officer. Petitioner elected not to be represented by his attorney, although the Hospital had granted permission for such representation at the appellate review hearing. Following the conclusion of the appellate review, the panel recommended and the Board of Trustees affirmed the denial of Petitioner's application for medical staff membership.

The Board of Trustees and Judicial Review Committee asserted several grounds for denying Petitioner's medical staff application. In the March 28, 1983 decision of the Board of Trustees (attached hereto as Appendix A), the Board stated the grounds for the denial, including that Petitioner had misrepresented his background to the Hospital by falsely asserting that he was a faculty member of a nearby teaching institution, when he was not, and had been offered a position at a New York medical center, when in fact that hospital had denied his request for continued training. Also, he stated that the state licensing board, the Board of Medical Quality Assurance (BMQA), had concluded its investigation of his practice when in fact he later admitted that he had been told the month before that BMQA would be filing charges against him.

In addition, Petitioner misrepresented his qualifications to the public and other hospitals, by falsely claiming training and qualifications he did not possess.

Further, Petitioner's professional and personal judgment in many cases was extremely deficient. For example, he had attempted to coerce a licensed vocational nurse to administer medications when she was not licensed to do so by instructing the critically ill patient's husband (who was a layman) to administer intravenous chemotherapy. He also used unlicensed personnel in his office to administer intravenous chemotherapy.

Petitioner's medical management and skills were also seriously deficient. He had, for example, failed to recognize and appropriately treat a diabetic coma in one patient, had prescribed fluid administration that could have caused renal failure for another patient, prescribed for a patient suffering from congestive heart failure a drug which could actually worsen the patient's condition, and failed to provide proper care for a patient with severe asthma.

Accordingly, the Judicial Review Committee and the Board of Trustees concluded that ample reason supported the denial of Petitioner's request to practice at the Hospital. This decision was affirmed by the trial court and California's Fourth District Court of Appeal. The California Supreme Court denied Petitioner's petition for certiorari.

III

JURISDICTION

The United States Supreme Court does not have jurisdiction in this case because a private hospital's decision to deny a physician staff privileges does not involve any of the grounds set forth in 28 U.S.C. Section 1257(3), which Petitioner claims provides the basis for the Court's jurisdiction. Section 1257(3) provides for jurisdiction in cases involving the validity of treaties, the federal Constitutionality of a state statute, or where any "title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States." 28 U.S.C. Section 1257(3). However, a private hospital's denial of staff privileges does not involve any treaty, statute or federal Constitutional right. Thus, Petitioner has improperly asserted that the Court has jurisdiction of the instant case under 28 U.S.C. Section 1257(3).

A. THIS CASE PRESENTS NO QUESTION OF FEDERAL CONSTITUTIONAL LAW REQUIRING RESOLUTION BY THIS COURT

The threshold inquiry when determining whether a physician has a federal Constitutional right under the Fourteenth and Fifth Amendments is whether State Action was present. In

order to establish a Fourteenth Amendment right, (and in the present case, to demonstrate a Constitutional right), it is necessary to allege that one's Constitutional rights were infringed upon as a result of 'State Action' since the Fourteenth Amendment "erects no shield against merely private conduct, however discriminatory or wrongful." *Blum v. Yaretsky,* 457 U.S. 991, 1002, 73 L.Ed.2d 534, 545, 102 S.Ct. 2777 (1982). A private hospital's decision to deny staff privileges to a physician does not constitute "State Action" which may create rights protected by the Fourteenth Amendment. *Crowder v. J. K. Conlan,* 740 F.2d 447 (6th Cir. 1984). (*See also Hayman v. City of Galveston,* 273 U.S. 414, 71 L.Ed. 714, 47 S.Ct. 363 (1927), in which the United States Supreme Court concluded that a public city hospital's decision to exclude osteopaths was not subject to state or federal Constitutional protection.)

As is discussed below, Petitioner has not demonstrated any nexus between the private Hospital's action and the state so that the Hospital's actions may fairly be treated as those of the state. His mere references to the California statute requiring the Hospital to report adverse privilege decisions to the State do not meet the standards for invoking Fourteenth Amendment protections. Also, his position regarding a private hospital's privilege decision constituting State Action is contrary to the decisions on this issue in all circuits.

Further Petitioner incorrectly asserted (without citing any authority) that "[t]he California courts have held . . . that [medical staff hearings] are subject to the Due Process Clause of the Constitution of the United States." Petition for Certiorari, at 4. California's Courts have held no such thing. In a carefully preserved distinction, the California Supreme Court has indicated that a physician's rights to review of private organizations' staff decisions "arise from the common law rather than the Constitution as such; although *Pinsker I* utilized 'due process' terminology in describing defendant associations' obligations, the 'due process' concept is applicable only in its broadest, nonconstitutional connotation." *Pinsker v. Pacific Coast Society of Orthodontists,* 12 Cal.3d 541, 550, 116 Cal.Rptr. 245, 526 P.2d 253 (1974). Thus, California courts have consistently indicated that physicians' staff privileges may not be refused or restricted "in the absence of a procedure comporting

with the minimum *common law* requirements of procedural due process . . ." *Anton v. San Antonio Community Hospital,* 19 Cal.3d 802, 815, 140 Cal.Rptr. 442, 567 P.2d 1196 (1977) (emphasis added). They have specifically not held that any review rights stem from Constitutionally protected rights, under either the California or the Federal Constitution.

B. STATE ACTION AND CONSTITUTIONAL ANALYSIS

The Fourteenth Amendment's guarantee of Due Process applies to Petitioner's claim only if he can show that the Hospital's action in denying him membership on its medical staff was tantamount to action by the State of California. Recently, in *Blum v. Yaretsky,* 457 U.S. 991, 102 S.Ct. 2777, 73 Ed. 2d 534 (1982), the Supreme Court reiterated the rationale for Constitutional State Action analysis:

> "The Fourteenth Amendment . . . provides in part that '[n]o State shall . . . deprive any person of life, liberty, or property without due process of law.' Since this Court's decision in the Civil Rights cases . . . 'the principle has become firmly embedded in our constitutional law that the action inhibited by the first section of the Fourteenth Amendment is only such action as may fairly be said to be that of the States.' *Shelley v. Kraemer* . . . 'That amendment erects no shield against merely private conduct, however discriminatory or wrongful.' Ibid." 457 U.S. at 1002-1003 (citations omitted).

In *Blum,* the Supreme Court held that private nursing homes' decisions to transfer patients without notice or an opportunity to be heard did not constitute State Action. In so holding, the Court rejected the Medicaid patients' claim that the actions were State Action because the State had mandated that the private nursing homes periodically assess what level of care the patients required and adjusted the amount of state payments for the services based upon the nursing homes' decisions. 457 U.S. at pp. 993-996.

The plaintiffs in *Blum* alleged that the nursing home procedures and the state process did not give them adequate notice of the nursing homes' decisions or of their right to an administrative hearing, in violation of their rights under the Due Process clause of the Fourteenth Amendment. 457 U.S. at pp. 993-996.

The United States Court of Appeals for the Second Circuit affirmed the District Court's grant of an injunction, holding that the facilities' decisions " 'involve state action affecting constitutionally protected property and liberty interests.' " *Id.*, quoting 629 F.2d at 820. The Supreme Court noted that the Court of Appeals "premised its identification of state action on the fact that state authorities 'responded' to the challenged transfers by adjusting the patients' Medicaid benefits, *Id.*, which 'establish[ed] a sufficiently close "nexus" between that State and either the nursing homes or the URC's to justify treating their actions as those of the State itself.' " *Id.*

The Supreme Court reversed, finding that the plaintiffs had failed to establish "State Action" in the nursing homes' decisions to transfer or discharge patients because "[t]hose decisions ultimately turn on medical judgments made by private parties according to professional standards that are not established by the State." *Blum,* 457 U.S. at 1008. The Court based its opinion on the principles applicable to claims of State Action against private parties. Initially the Court noted, " '[t]he mere fact that a business is subject to state regulation does not by itself convert its action into that of the state for purposes of the Fourteenth Amendment,' " *Id.* at 1004, quoting *Jackson v. Metropolitan Edicon Co.,* 419 U.S. 345, 350, 42 L.Ed.2d 477, 95 S.Ct. 449 (1974). The Court held that "[t]he complaining party must show that 'there is a sufficiently close nexus between the state and the challenged action of the regulated entity so that the action of the latter may be fairly treated as the action of the State itself.' " 457 U.S. 1004, quoting *Jackson, supra,* at 351. The court concluded that "[t]he purpose of this requirement is to assure that Constitutional standards are invoked only when it can be said that the State is *responsible* for the specific conduct of which the plaintiff complains." 457 U.S. at 1004 (emphasis in original).

The Court explained that:

> "our precedents indicate that a state normally can be held responsible for a private decision only when it has exercised *coercive power* or has provided such *significant encouragement,* either overt or covert, that the choice must in law be deemed to be that of the state . . . Mere approval of or acquiescence in the initiative of a private party is not

> sufficient to justify holding the state responsible for those initiatives under the terms of the Fourteenth Amendment." *Id.* (Emphasis added.) (Citations omitted.)

Also, it indicated that the nexus mentioned above "may be present if the private entity has exercised powers that are traditionally the exclusive prerogative of the State." *Id.* at 1005.

The Supreme Court held that the Court of Appeals' finding of State Action could not withstand analysis under these three principles. Noting that the lower court based its reasoning on the fact that the State "responded" to those decisions by adjusting the patient's Medicaid benefits, the Court stated:

> "Respondents, however, do not challenge the adjustment of benefits, but the discharge or transfer of patients to lower levels of care without adequate notice or hearings. That the State responds to such actions by adjusting benefits does not render it *responsible* for those actions. The decisions about which respondents complain are made by physicians and nursing home administrators, all of whom are concededly private parties. There is no suggestion that those decisions were influenced in any degree by the State's obligation to adjust benefits in conformity with changes in the cost of medically necessary care." *Id.* (Emphasis in original.)

Like that of the plaintiffs in *Blum,* Petitioner's claim of State Action must also fail. Petitioner has not sued California, but rather the Hospital, a private entity, claiming that its actions were State Action, even though the State was not directly involved in any aspect of the decision to deny him staff privileges. Moreover, Petitioner cannot demonstrate that any of the standards articulated by the court in *Blum* have been met.

First, that a private hospital is subject to state regulation is insufficient to show State Action. Thus, Petitioner has not demonstrated State Action simply by referring to the state regulations that control the judicial review of physician application cases, provide immunity from liability for physicians participating in peer review, and provide immunity from discovery for the Committee's records. Petition for Writ of Certiorari, pp. 4-5. (Contrary to Petitioner's assertion, there is no California legislation which "controls . . . how the proceedings are con-

ducted" *Id.*, p. 4.) None of these regulations involve the state in the actual action, which is the hospital's decision to deny staff privileges.

Similarly, contrary to Petitioner's assertion (Petition for Certiorari, p. 6), the hospital's action is not transformed into State Action merely because California law requires private hospitals to report denials of staff privileges to the state licensing authority, which then shares this information with other hospitals. Like the state agencies in *Blum* responsible for Medicaid administration, California physician licensing authorities *respond* to the action of the private entity, the hospital. Petitioner is not challenging the state reporting statute, but instead the hospital's decision (denial of privileges) that gives rise to the reporting requirement. Thus, as in *Blum*, the fact that the state responds to the hospital's decision does not make the state responsible for the decision, which is made by members of hospital medical staff committees and the hospital's governing board of trustees on the basis of their private standards of medical competency.

Second, there is no coercive power, or even any significant encouragement, on the State's part that petitioner can allege with regard to the denial of his request for medical staff privileges. Third, the powers exercised by the Respondent in this case (to grant or deny medical staff membership) are not powers that are traditionally the exclusive prerogative of the state. Rather, they are powers traditionally exercised by private hospitals like Respondent.

In the context of medical staff privilege decisions of hospitals, all of the federal judicial circuits considering the issue have concluded that private hospital decisions do not constitute State Action. These courts have adopted rules consistent with the State Action analysis of *Blum*. For example, in *Goss v. Memorial Hospital System*, 789 F.2d 353 (5th Cir. 1986), a physician whose medical staff privileges were suspended brought action against the hospital under 42 U.S.C. Section 1983, claiming that the hospital's conduct denied him procedural Due Process, basing his claim on many of the same grounds that Petitioner herein relies on. The *Goss* plaintiff's theory was that hospital acted under color of state law when it expelled him from the Medical Staff by acting under the authority of the

Texas Medical Practice Act. This act, much like California law, required review of physicians' qualifications for staff privileges and authorized a medical peer review committee to report its findings to the Texas State Board of Medical Examiners. It also provided immunity from liability for peer review committee members, as does California law. (See *California Civil Code* Sections 43.7, 43.8.)

The United States Court of Appeals for the Fifth Circuit held that the hospital's peer review actions did not constitute State Action. In order to be considered State Action, the court held, there would have to exist a "nexus" between the acts of the peer review committee members and the state "such that appellees' conduct is "fairly attributable to the state.' " 789 F.2d at 356, quoting *Rendell-Baker v. Cohn,* 457 U.S. 830, 838, 102 S.Ct. 2764, 2770, 73 L.Ed.2d 418 (1982). In order to be so attributable, the state must have "exercised coercive power or [have] provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the state," *Id.,* quoting 457 U.S. at 840 (citations omitted). *See also, Lubin v. Crittenden Hospital Association et al.,* 713 F.2d 414 (8th Cir. 1983) *cert. den.,* 465 U.S. 1025, 79 L.Ed.2d 685, 104 S.Ct. 1982 (1984) (no nexus between state's relationship to operation of private hospital, which leased land and building owned by county, and disciplinary action taken against a physician so as to justify attribution of challenged action of the hospital to the state). The actions of Respondent herein likewise are not "fairly attributable to the state," nor is there any exercise of "coercive power" or "significant encouragement" sufficient to qualify Respondent's actions against Petitioner as an action of the state.

All other circuits are in accord with *Goss* in requiring the showing of a nexus between the activity complained of and the state and concluding that none exists in the context of private hospital privilege decisions. See, e.g., *Hodge v. Paoli Memorial Hospital,* 576 F.2d 563 (3d Cir. 1978) and citations therein (private hospital's receipt of federal construction funding, Medicare and Medicaid funds, and existence of tax exemption, as well as state licensing requirements for nonprofit hospitals, did not constitute State Action under Civil Rights Act of 1871); *Madry v. Sorel,* 558 F.2d 303, *reh.den.,* 561 F.2d 831 (5th Cir.

1977) *cert.den.,* 434 U.S. 1086, 55 L.Ed.2d 791, 986 S.Ct., 1280, *reh.den.,* 435 U.S. 982, 56 L.Ed.2d 76, 98 S.Ct. 1634 (1978) (fact that private, non-profit, tax-exempt hospital received financial support from local and federal government and that bylaws allowed public officials to serve as ex officio members of board of governors did not render hospital's actions State Action); *Schlein v. Milford Hospital,* 561 F.2d 427 (2d Cir. 1977) (where hospital was state licensed, regulated by state health department, tax-exempt and empowered by the state to annex contiguous land for expansion, and where state was not shown to have played any part in the formulation or implementation of procedures utilized in deciding applications of staff privileges, and played no role in making the decision itself, there was no State Action and the court lacked subject matter jurisdiction); *Aasum v. Good Samaritan Hospital,* 542 F.2d 792 (9th Cir. 1976) (fact that three of seven board members were publicly appointed, or that hospital was recipient of federal construction funds did not constitute State Action under 42 U.S.C. Sec. 1983); *Briscoe v. Bock,* 540 F.2d 392 (8th Cir. 1976) (action taken by private hospital not necessarily State Action merely because hospital is chartered by state, or because hospital has state-conferred monopoly, or because activities of hospital are strictly regulated by state, or because functions performed by hospital serve public convenience or necessity; there must be nexus between state and challenged action); *Watkins v. Mercy Medical Center,* 520 F.2d 894 (9th Cir. 1975) (for state involvement with a private hospital to confer jurisdiction under 42 U.S.C. 1983, the involvement must be with the specific activity of which a party complains and the involvement must be significant); *Jackson v. Norton-Childrens Hospitals,* 487 F.2d 502 (6th Cir. 1973) *cert.den.,* 416 U.S. 1000, 40 L.Ed. 2d 776, 94 S.Ct. 2413 (1974) (mere fact of partial federal funding of private hospital will not give rise to State Action); *accord, Ascherman v. Presbyterian Hospital of Los Angeles,* 507 F.2d 1103 (9th Cir. 1974); *Musso v. Suriano,* 586 F.2d 59 (7th Cir. 1978) *cert. den.,* 440 U.S. 971, 99 S.Ct. 1534, 59 L.Ed.2d 788 (1979).

Although the Sixth Circuit found State Action with respect to some hospital staff decisions,[1] it subsequently determined that private hospital staffing decisions did not involve State Action. In *Crowder v. J.K. Conlan, supra,* 740 F.2d 447, the court rejected a physician's claim that a private hospital's restriction of his staff privileges violated his civil rights on the grounds that the complained of action did not constitute State Action. The Court held that the receipt of government payments, the extensive state regulation of the hospital, the service of public officials on the governing body by virtue of their public positions, and the ownership of the facility by the county were insufficient to warrant a finding of State Action in the hospital's decision to restrict the physician's privileges. The court expressly overruled the cases finding "State Action" in similar circumstances, noting that "the legal reasoning of these cases is no longer valid in light of the Supreme Court's recent holdings in this area of the law." 740 F.2d at p. 449.

Similarly, the Fourth Circuit reconsidered its position in light of the Court's holding in *Jackson v. Metropolitan Edison Co.,* 419 U.S. 345, 351, 95 S.Ct. 449, 453, 42 L.Ed.2d 477 (1974), and concluded that a private hospital's termination of a physician's staff privileges did not constitute State Action. *Modaber v. Culpeper Memorial Hospital, Inc.,* 674 F.2d 1023 (4th Cir.

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[1]In the Sixth Circuit cases finding State Action, the courts evaluated the many facts reflecting unique ties to government action. In each case, the facts were far more extreme than those alleged by Petitioner. *See, e.g., O'Neill v Grayson County War Memorial Hospital,* 472 F.2d 1140 (6th Cir. 1973) (defendant hospital was county's only such facility, was financed in part by federal construction funds, and operated under a lease from the county, under the terms of which it paid only $1.00 for a fifteen-year lease; and agreed to fulfill all duties and responsibilities incident to hospital's maintenance and operation; that all gifts were to become county property in the event the hospital ceased to exist; and that hospital's board of directors would at all times contain at least one member from each magisterial district of the county) *Chiaffitelli v. Dettmer Hospital Inc.,* 437 F.2d 429 (6th Cir. 1971) (hospital's charter provided that five of nine board members would be public officials, and fourteen per cent (14%) of budget came from public sources); *Meredith v. Allen County War Memorial Hospital Commission,* 397 F.2d 33 (6th Cir. 1968) (hospital commission was appointed by the governing body of the county, and the hospital was the only one in the area, was public, and was financed in part by federal construction funds).

1982). It more recently affirmed this position in *Carter v. Norfolk Community Hospital Assn., Inc.,* 761 F.2d 970 (4th Cir. 1985). Thus, the Fourth Circuit no longer is following the decisions finding State Action in a private hospital's decision to terminate or deny a physician's staff privileges.

In the instant case, Petitioner claims that Respondent wrongfully denied his application for staff membership. However, Respondent's decision to do so is not "fairly attributable to the state." It was Respondent which decided to deny Petitioner's application for membership, not the state. There was no exercise of "coercive power" or "significant encouragement" on the state's part, insofar as that decision was concerned, and Respondent's actions against Petitioner thus cannot qualify as an action of the state.

C. STATE ACTION AND ANTITRUST ANALYSIS

Recent United States Court of Appeals decisions in the antitrust area indicate that medical staff privileges decisions involve State Action. However, the "State Action" analysis applicable in the antitrust suits differs fundamentally from that in the Due Process and Constitutional arena.

In *Patrick v. Burget,* Nos. 85-3759, 85-4071 (9th Cir., filed September 30, 1986), the United States Court of Appeals for the Ninth Circuit held that Oregon peer review proceedings were "State Action" for purposes of Federal *antitrust* analysis. The Seventh Circuit reached the same conclusion in *Marrese v. Interqual, Inc.* 748 F.2d 373 (1984), *cert.den.,* ____U.S. ____, 87 L.Ed.2d 632, 105 S.Ct. 3501 (1985). However, this does not suggest that peer review proceedings are also State Action for purposes of *Constitutional* analysis under the Fifth and Fourteenth Amendments to the United States Constitution. In fact, only the names of the two doctrines are the same. They are completely different in both theory and application.

In antitrust analysis, the doctrine of State Action originated in *Parker v. Brown,* 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315 (1943), when a California raisin producer challenged, under the Sherman Antitrust Act, a state statute that authorized "programs for the marketing of agricultural commodities produced in the state, so as to restrict competition among the

growers and maintain prices in the distribution of their commodities to packers." 317 U.S. at 346. The United States Supreme Court, noting that American government is "a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority," held that the Sherman Act was not applicable to activity mandated by state Legislatures, even if such activity had an anticompetitive effect.

Later Supreme Court decisions refined both the aim of the antitrust State Action doctrine and its jurisprudential basis. In *Hoover v. Ronwin,* 466 U.S. 558, 104 S.Ct. 1989, 80 L.Ed.2d 590 (1984), this Court explained that "the state action doctrine is grounded in concepts of federalism and state sovereignty," *Id.,* citing *Community Communications Co. v. Boulder,* 455 U.S. 40, 102 S.Ct. 835, 70 L.Ed.2d 810 (1982). The doctrine is aimed at "the replacing of entirely free competition with some form of regulation or restraint . . . authorized or approved by the State . . . ." 466 U.S. at 568 (citations omitted).

Unlike antitrust State Action analysis, which seeks to determine, based on principles of federalism and state sovereignty, under what special circumstances certain anticompetitive activity will be considered beyond the realm of federal regulation, *Constitutional* State Action is a doctrine that grew out of the Fourteenth Amendment.

The antitrust State Action doctrine is aimed at assessing the state mandate for and supervision of an activity. Thus, it is designed to determine whether an activity is required by the state and adequately supervised by the state and therefore should not be subjected to scrutiny under the federal antitrust laws. It is sufficient, according to *Patrick,* that Oregon's laws require hospitals to perform peer review and provide judicial review of the decisions to exempt the peer review process from antitrust review. In contrast, the Due Process State Action doctrine is designed to determine whether the *action* that was taken was coerced or required by the state. Thus, it is not sufficient that the state requires peer review and provides judicial review of the decisions; a plaintiff must also demonstrate a nexus between the private party's action (such as the denial of staff privileges) and the State Action. In essence, the state must have actively participated in the activity and coerced

the result; not merely have required that the activity be undertaken.

It was only the antitrust, supervision type of "State Action" that the Ninth Circuit found in *Patrick v. Burget. See Patrick, supra,* slip op. at 9, where the court cites to, and relies on, both *Parker* and *Ronwin, supra.* If Petitioner had alleged an unlawful restraint of trade (which he did not), the state's system of medical staff peer review might be found to constitute "State Action" which provides an exemption from antitrust review, and the analysis of the *Patrick, Parker,* and *Ronwin* cases would be applicable (but certainly not helpful) to Petitioner's antitrust case.

Respondent has found no case that applies the antitrust State Action analysis of *Parker* and its progeny to a claim like Petitioner's that seeks to establish Due Process rights under the Fifth and Fourteenth Amendments to the United States Constitution.[2] Instead, the Constitutional standards established by this Court, not the antitrust standards, are those applicable to Petitioner's claim of State Action. It is those standards that Petitioner must, but cannot meet in order to invoke this Court's jurisdiction.

IV

ASSUMING PETITIONER HAS CONSTITUTIONALLY PROTECTED RIGHTS, HE WAS AFFORDED A FAIR HEARING

Assuming, arguendo, that Petitioner has demonstrated a sufficient nexus between the State and the private hospital's decision to deny him staff privileges, the Petition for Writ of Certiorari should nevertheless be denied since Petitioner has not demonstrated that he was not given a fair hearing.

Further, Petitioner failed to raise this issue below. Thus, the California courts did not consider Petitioner's federal Consti-

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[2]Indeed, it is telling that *Patrick,* a Ninth Circuit decision, does not cite to *Aasum, Watkins,* or *Ascherman, supra,* all of which are also Ninth Circuit cases. Presumably, if the court has intended to make a decision affecting Constitutional State Action, it would have at least mentioned those cases.

tutional claims and he cannot meet the standard set forth in the United States Supreme Court Rule 17.1(c), which provides:

> "A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered.
>
> . . .
>
> "(c) When a state court . . . has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court."

In the present case, the California appellate court was never presented with the questions Petitioner now raises before this court, i.e., whether federal Constitutional principles require hospitals to permit physicians to be represented at medical staff hearings by their retained counsel and whether a hospital's use of its legal counsel to serve as the appellate review hearing officer is improper. Thus, the state has not decided the question and any review is improper.

Even if the questions had been properly presented to the State courts and were properly before this court for review, Petitioner has not demonstrated that he was deprived of a fair hearing, under California common law principles or federal Constitutional due process standards.

A. NEITHER COMMON LAW FAIR PROCEDURE NOR CONSTITUTIONAL DUE PROCESS REQUIRES HOSPITALS TO PERMIT PHYSICIANS TO BE REPRESENTED AT HEARINGS BY RETAINED COUNSEL

Petitioner's primary challenge to the hospital's denial of his medical staff application is based upon his assertion that the Hospital should not be permitted to deny his request to have his attorney present at the hearing. Petitioner claims that the Hospital rule, which gives the hearing committee the discretion to decide whether to permit attorneys to be present at the hearing, and the decision not to permit Petitioner to be so

represented, deprive him of a Constitutional liberty or property right, without Due Process of law. (Petition for Certiorari, pp. 6-12.) However, Petitioner, like the veterans in *Walters v. National Association of Radiation Survivors,* 105 S.Ct. 3180, 87 L.Ed.2d 220 (1985), has failed to demonstrate that Due Process requires the presence of attorneys.

The Court, in *Walters*, established a three part test for evaluating a claim for additional procedural protections in administrative hearings, and specifically for a claim that veterans were being improperly denied a right to be represented by attorneys they retained as a result of a federal statutory $10.00 attorney fee limitation. This Court initially reiterated that " 'due process' is a flexible concept — that the processes required by the Clause with respect to the termination of a protected interest will vary depending upon the importance attached to the interest and the particular circumstances under which the deprivation may occur." 105 S.Ct. at p. 3189, *citing Mathews v. Eldridge*, 424 U.S. 319, 334, 96 S.Ct. 893, 902, 47 L.Ed.2d 18 (1976) and *Morrissey v. Brewer*, 408 U.S. 471, 481, 92 S.Ct. 2593, 2600, 33 L.Ed.2d 484 (1972). The Court noted that "in defining the process necessary to ensure 'fundamental fairness' we have recognized that the Clause does not require that 'the procedures used to guard against an erroneous deprivation . . . be so comprehensive as to preclude any possibility of error." *Id.*, (citation omitted). The Court emphasized that "the marginal gains from affording an additional procedural protection often may be outweighed by the societal cost of providing such a safeguard." *Id.*, (citation omitted).

In light of these fundamental principles, the court indicated that the test to be used to assess requests for procedural protections are those articulated by the court in *Mathews*. These require a court to consider, first, the "private interest that will be affected by the official action," second, "the risk of an erroneous deprivation of such interest through the procedures used," and third, "the probable value of additional or substitute procedural safeguards," and fourth, "the government's interests in adhering to the existing system." *Walters, supra*, 105 S.Ct. at p. 3189. The test is to be used to determine the risk of error as "applied to the generality of cases, not the rare exceptions." *Id.* (Citations omitted.)

In *Walters*, this Court concluded that a statutory $10.00 limit on the fees that could be paid to attorneys representing veterans in veterans benefit disputes did not violate Due Process, even though it effectively deprived the veterans of any legal assistance except the scant volunteer services that were available. In so holding, this Court noted that the government defended the fee limitation by arguing that it protected veterans by assuring that they, rather than attorneys received the benefits and encouraged informality in the hearing process.

This Court found the government interest in reducing adversarial hearings (which the Court found would occur if attorneys were allowed to participate) and thereby minimizing administrative costs must be given great weight. *Id.*, at pp. 3189-3192. It stated that only an extraordinarily strong showing of a probability of error could overcome this interest, and concluded no such showing had been made. *Id.*, at pp. 3192-3193. Further, it found little information to justify any finding that eliminating the fee restriction and thereby allowing the participation of attorneys in the veterans benefit claim cases would result in valuable procedural safeguards. *Id.*, at pp. 3193-3194. Cf. *Parham v. J.R.* 442 U.S. 584, 609-612, 99 S.Ct. 2493, 2507-2509, 61 L.Ed.2d 101 (1979).

The same standards have been applied by the California and other state courts, in reviewing challenges to procedures used for medical staff case review, and specifically, the question of attorney participation in administrative hearings. The California Supreme Court noted that:

> "[t]he common law requirement of a fair procedure does not compel formal proceedings with all the embellishments of a court trial . . . nor adherence to a single mode of process. It may be satisfied by any one of a variety of procedures which afford a fair opportunity for an [affected individual] to present his position." *Pinsker v. Pacific Coast Society of Orthodontists, supra,* 12 Cal.3d 541, 555.

The California Supreme Court has adopted the same four part balancing test for determining whether a procedural protection is necessary to ensure a fair hearing that was used by the United States Supreme Court in *Walters, supra. People v. Ramirez*, 25 Cal.3d 260, 269, 158 Cal.Rptr. 316, 599 P.2d 622

(1979). The Court has employed a similar analysis to determine the requirements of fair procedure. *Anton v. San Antonio Community Hcspital,* 19 Cal.3d 802, 827, 140 Cal.Rptr. 442, 567 P.2d 1162 (1977). Using this analysis, California courts to date have rejected the suggestion that a physician has the right to be represented by retained counsel at peer review hearings regarding privilege denials or terminations. In *Anton, supra,* the California Supreme Court approved Respondent Hospital's bylaw provision governing legal representation, although it also noted that Dr. Anton had failed to request counsel in a timely manner. But, the Court nevertheless indicated that ". . . rendering representation by counsel a matter within the discretion of the judicial review committee is not offensive to the standard of 'minimal due process' which is applicable in proceedings of this kind." 19 Cal.3d at 827 (citations omitted). The Court also indicated that:

> " '. . . counsel would probably not be necessary unless the hospital's attorney is used in the proceeding or the extreme nature of the charges involved indicated that representation by an attorney would be advantageous.' " *Id.,* p. 816 (citation omitted).

Similarly, the court in *Cipriotti v. Board of Directors,* 147 Cal.App.3d 144, 156-157, 196 Cal.Rptr. 367, (1983) upheld the hospital decision despite the terminated physician's objections to the denial of his request to be represented by a lawyer. The court found that the bylaws provided that a lawyer could not appear on behalf of any party in the hearing process; but that petitioner nevertheless was afforded a fair hearing. The court noted that "the hospital should not be hampered by formalities not required by its bylaws nor by due process considerations." *Id.,* at p. 157.

Petitioner's claim that Due Process requires the hospital to allow him to be represented by an attorney at a medical staff hearing must similarly be rejected. First, the California Supreme Court has held that the interests involved in a physician's application for staff privileges are fundamental, but not vested. *Unterthiner v. Desert Hospital District,* 33 Cal.3d 285, 297, 188 Cal.Rptr. 590, 656 P.2d 554 (1983) *cert. denied,* 464 U.S. 1068, 104 S.Ct. 973, 79 L.Ed. 29, 211 (1984). The nature of the tendered issue in medical staff hearings is whether the physi-

cian is "qualified to take on the additional responsibilities involved in a grant of hospital privileges." *Id.*, 33 Cal.3d at 298. California courts have recognized that medical staff hearings "are not for the purpose of punishment, but [are] primarily to protect the public served by the licensee employed by a hospital." *Cipriotti v. Board of Directors, supra,* 147 Cal.App.3d at 157. In this regard, the court emphasized that a hospital must have the freedom to establish high standards of professional work in order to carry out its duty to exercise a high degree of care towards its patients and to minimize its exposure to lawsuits based upon negligence of its staff, a basis for recovery recognized in *Elam v. College Park Hospital,* 132 Cal.App.3d 332, 183 Cal.Rptr. 156, *modified,* 133 Cal.App.3d 94(a) (1982). *Id.*

The competition of the interests of the physician and the hospital was succintly recognized by the Court in *Silver v. Castle Memorial Hospital,* 53 Ha. 475, 485, 497 P.2d 564, 571, (1972):

> "The doctor has an interest in being able to pursue his profession which requires that the necessary facilities be available to him. The hospital is interested in preserving its autonomy and in maintaining quality control in its medical staff. The public's interest lies in the perpetuation of that quality control and in the sense that its services are and remain available to those in need, in the productivity of the hospital." (Footnote omitted.)

Hospitals must be able to carry the burden of evaluating the competency of applicants for staff privileges and members with privileges and providing hearings when privileges are denied or restricted. Thus, hospitals, like the government in *Walters,* have an interest in maintaining the informality of the medical staff peer review proceedings. Both the hospital and the public have an interest in avoiding the burdens of a formal adversary trial in every case involving possible suspension or denial of a physician's privileges. Recognition of a right of the physician to appear with counsel would result in frequent use of hospital counsel, just as this Court in *Walters* found that it would necessitate the government retaining attorneys. Also, as this Court found in *Walters,* the introduction of attorneys would undoubtedly add to the complexity and adversarial nature of

the hearing process. The prospect of additional hours of cross-examination and arguments on objections would discourage participation of physicians who serve voluntarily on the committees entrusted with the initial responsibility for maintaining high standards of care. (See Kessenick, Physicians' Access to the Hospital: An Overview, (1979) 14 U.S.F. L.Rev. 43, 59-61.) As noted in *Cipriotti v. Board of Directors, supra,* 147 Cal.App.3d 144, 157, the primary purpose of proceedings to deny or terminate staff privileges is protection of the public. This purpose will not be served if participation on peer review panels becomes too burdensome to attract competent, active and dedicated physicians.

Second, there is little risk of an erroneous deprivation of rights. In these hearings, when the physician is not represented by counsel, the medical staff also is not represented by counsel. Thus, the hearings, which are held before a panel of physicians, require only the presentation of medical and professional information by physicians. The physicians involved in medical peer review hearings are mature, highly educated individuals, who are relatively well able to present their position. Thus, the absence of counsel presents little risk of erroneous deprivation of privileges. As this Court noted in *Walters,* "it is less than crystal clear why *lawyers* must be available to identify possible errors in *medical* judgment." 105 S.Ct. at p. 3194.

Moreover, the issue is whether the physician is competent to practice at the Hospital. His ability to communicate effectively with his peers is therefore relevant to the merits of the case.

Also, the prohibition against lawyers pertains only to their presence at the hearing. Thus, a physician is entitled to and Petitioner did seek the assistance of legal counsel to prepare for the hearing and present objections to procedural issues. Thus, the complained of restriction is far less harsh than the statutory $10.00 attorney fee limit in *Walters,* which effectively prevents veterans from retaining attorneys for any assistance.

Third, the introduction of lawyers might actually hamper the presentation of evidence, since the issues at a peer review hearing pertain to matters of medical practice and standards. In this situation, representation by another physician may be more effective. (See *Madera v. Board of Education of City of New*

York, 386 F.2d 778, 788 (1967), *cert. denied,* 390 U.S. 1028, 88 S.Ct. 1446, 20 L.Ed.2d 284 (1968). Thus, instead of adding procedural protections, the introduction of lawyers to address medical issues may actually decrease the protections.

Petitioner argues that attorneys should be allowed because the results of the hearings, if adverse to the physician, must be reported to the state licensing board and then to other hospitals where the physician practices or wants to practice. Petition for Certiorari, pp. 10-13. This argument is misplaced, however. To the extent the state reporting statute provides for improper dissemination of information, the proper challenge is to that statute. Moreover, the California courts already have provided appropriate relief for any erroneous decisions, as illustrated by the decision in *Haller v. Burbank Community Hospital,* 149 Cal.App.3d 650, 199 Cal.Rptr. 45 (1983). In that case, the hospital was ordered to withdraw its improperly filed report. Further, no facts in the record below support Petitioner's arguments in the Petition for Writ of Certiorari, pp. 6-11 regarding the effects of the reports on a physician's reputation or other hospitals' staffing decisions.

Also, the nature of the private hospital decision is unchanged simply because a state responds to the decision by taking action. *Blum v. Yaretsky, supra.* (See the discussion in part III-B above.)

Petitioner's arguments regarding the burden of proof is similarly misplaced. The need for procedural protections depends upon the factors cited above, and the imposition upon an applicant of the burden of proving he is competent to exercise the requested privileges does not change the nature of the interests that are affected or the risk of an erroneous deprivation of an individual's rights. *Unterthiner v. Desert Hospital District, supra,* 33 Cal.3d at p. 298.

B. A HOSPITAL'S USE OF ITS OWN ATTORNEY DOES NOT VIOLATE DUE PROCESS

Petitioner has also asserted that he was denied a fair hearing because the Hospital's attorney acted as the hearing officer at the appellate review hearing. The Appellate Court concluded that the choice of the Hospital's attorney to act as the "hearing officer while concurrently representing the Hospital

was not improper as a matter of law." Petitioner's Appendix A, p. 12. The court relied upon the reasoning in *Rowen v. Workers' Comp. Appeals Bd.,* 119 Cal.App.3d 633, 174 Cal.Rptr. 185 (1981) that "in general, the fact that an administrative agency is both accuser and judge is not considered to deprive the accused of due process of law. [Citation.] We see no reason why, this being so, the same trained personnel cannot legally advise and assist the agency in both functions if such assistance does not violate any statutory provisions and if the agency itself makes the decision.' [Citation]" *Id.,* at pp. 640-641.

In *Withrow v. Larkin,* 421 U.S. 35, 95 S.Ct. 1456, 43 L.Ed.2d 712 (1975), this Court also concluded that a combination of investigatory and adjudicatory functions was not impermissible. In rejecting a physician's claim that the Medical Licensing Board was prejudiced by its investigation of the facts and therefore could not subsequently adjudicate the issue, the court stated that "[w]ithout a showing to the contrary, state administrators 'are assumed to be men of conscience and intellectual discipline, capable of judging a particular controversy fairly on the basis of its own circumstances." *Id.,* 421 U.S. at p. 55, 43 L.Ed.2d at p. 728.

Courts in other jurisdictions which have considered the issue of the use of a hospital attorney in connection with medical staff hearings have not only approved the use of the same attorney as a legal advisor as to fair procedure at the appellate level, but have even concluded that a physician was afforded fair procedure when the hospital's attorney "conducted the investigation, presented the evidence at the various proceedings and was present at the deliberations of the credentials committee when its recommendations were formulated and was also present at the deliberations of the board of trustees when it was determined that plaintiff's staff privileges should be suspended indefinitely." *Koelling v. Board of Trustees of Mary F. Skiff, M.H.,* 259 Iowa 1185, 146 N.W.2d 284, 194-195 (1967). *See also, Ladenheim v. Union County Hospital District.,* 76 Ill.App.3d 90, 394 N.E.2d 770, 774-775 (1979) and *Christihilf v. Annapolis Emergency Hospital Association,* 496 F.2d 174 (4th Cir. 1974). (In *Christihilf,* the court did not criticize the fact that the hospital's attorney had advocated the termination of the physi-

cian's privileges during the medical staff hearing and then advised the governing body during the appellate review.)

Petitioner has cited several cases to support his claim that the hearing officer was impermissibly biased. However, none of the cases are on point since all involve the question of whether the decision-maker, rather than a hearing officer, is impermissibly biased. Four of the cases Petitioner cites involved judges who were responsible for determining guilt or innocence. *Aetna Life Ins. Co. v. LaVoie,* No. 84-1601, ____ U.S. ____, 106 S.Ct. 1580, 89 L.Ed.2d 823 54 U.S.L.W. 4381 (1986) (judge casting a deciding vote on an undecided issue of law had maintained two personal actions involving the same issue); *Tumey v. Ohio,* 273 U.S. 510, 47 S.Ct. 437, 71 L.Ed. 749 (1927) (the judge who determined guilt or innocence was paid for his service only when he convicted the defendant); *Ward v. Village of Monroeville,* 409 U.S. 57, 93 S.Ct. 80, 34 L.Ed.2d 267 (1972), (the town's mayor, who was responsible for the village finances, acted as the judge who assessed the petitioner's guilt for a traffic offense and levied the fine); and *In Re Murchison,* 349 U.S. 133, 136, 75 S.Ct. 623, 99 L.Ed. 942 (1955) (a Michigan state judge serving as a one-man grand jury subsequently determined that two witnesses were guilty of contempt and sentenced them based upon events occurring during the grand jury proceedings). The remaining case involved an arbitrator who was responsible for making the decision. *Commonwealth Coatings Corp. v. Continental Cas. Co.,* 393 U.S. 145, 89 S.Ct. 337, 221 L.Ed. 301 (1968) (Arbitrator who made the decision had done $12,000 worth of business with one of the parties.)

Moreover, Petitoner's claims that the hearing officer was biased are unfounded in law or in fact. Petitioner has argued that it is improper for the same attorney to serve as the hearing officer at the appellate review hearing and then defend the decision in the subsequent legal challenges. Petitioner cites no authority to support this proposition and Respondent has found none. That the same attorney was subsequently asked to represent the Hospital in the litigation resulting from the decision does not reflect any particular bias or prejudgment against Petitioner at the time of the appellate review nor any impermissible combination of functions. Without specific facts revealing bias, it contravenes the presumption of honesty and

integrity established in *Withrow, supra,* to suggest that the Hospital attorney would give the Hospital's Board of Trustees legal advice regarding procedural and review matters that was geared toward the pecuniary interests of encouraging litigation rather than a lawful approach to the issues. Further, only interests that are " 'direct, personal, substantial, [and] pecuniary' " will justify disqualification of a judge, and not speculative allegations of such interests. *Aetna, supra,* 54 U.S.L.W. at p. 4385.

As the California Supreme Court explained in *Andrews v. Agricultural Labor Relations Board,* 28 Cal.3d 781, 171 Cal.Rptr. 590, 623 P.2d 151 (1981), the "right to an impartial trier of fact is not synonymous with the claimed right to a trier completely indifferent to the general subject matter of the claim before him." Instead, the Court stated that the concept of bias refers to a mental attitude towards a party to a proceeding, and not a crystallized point of view about issues of law or policy, which "is almost universally deemed no ground for disqualification." The Court pointed out that if an absence of bias required a total absence of preconception in the mind of the judge, " 'no one has ever had a fair trial and no one ever will . . .' " *Id.* at pp. 790-791.

Petitioner also argues that the hearing officer was an advocate against Petitioner. However, the only factual support for this argument is that the hearing officer's law firm filed the opposition to Petitioner's Petition for Writ of Mandate to require the Hospital to process his third application. This involvement is, however, not a reflection of any mental attitude towards Petitioner, as that case was based upon legal principles unrelated to Petitioner's qualifications to practice medicine or the fairness of the hearing procedure he subsequently received. Thus, nothing in the record supports Petitioner's argument that the hearing officer had, prior to or during the appellate review, assumed an advocate position or expressed any opinion regarding the merits of Petitioner's third application or claims of procedural error.

The hearing officer was not the decision-maker, but instead a lawyer who acted as the presiding officer. As the Medical Staff bylaws indicate, this role is limited to:

> "act[ing] to ensure that all participants in the hearing have a reasonable opportunity to be heard, that all competent and available oral and documentary evidence is presented and that decorum is maintained. He shall be entitled to determine the order or procedure during the hearing. He shall have the authority and discretion, in accordance with these Bylaws, to make all rulings on questions which pertain to matters of law and to the admissibility of evidence." Medical Staff Bylaws, Appendix C, p. 6.

Thus, with the limited role of the hearing officer, and the absence of any indications of prejudgment of the merits of Petitioner's claims in connection with his third application, Petitioner has failed to demonstrate grounds for disqualifying the hospital's attorney from acting as the hearing officer.

Petitioner further alleges that the hearing officer demonstrated bias in her ruling that a decision should be delayed and made by the appellate panel on the issue of whether the Board of Trustees members who previously considered Petitioner's second medical staff application should be disqualified from reviewing the third application. This matter was reserved for the appellate panel's consideration. Contrary to Petitioner's claim, the appellate panel, not the hearing officer, did address this issue, finding:

> "it was proper to allow members who had been involved in the consideration of previous applications to participate in the appellate review, both at the appellate review panel level and the Board level, since the composition of the Board is not significantly different than it was in January 1981, [sic] when [Petitioner's] second application was considered. Thus, as a practical matter, the hospital's Board of Trustees necessarily includes members who considered [Petitioner's] second application and this cannot invalidate the Board's authority to conduct an appellate review of the third application." Board of Trustees appellate review decision, Respondent's Exhibit A, p. 2.

This ruling simply reflected the need to weigh facts, which was not the role of the hearing officer, and did not reflect any impermissible prejudgment.

C. PETITIONER IMPROPERLY RAISED THE ISSUE OF THE ALLEGED BIAS OF THE APPELLATE REVIEW PANEL

Petitioner further asserts that Petitioner was denied effective appellate review because three Board of Trustees members reviewing his third application had participated in the review of his second application. This issue was improperly placed before the Court, since it was not addressed in the initial statement of Questions presented. (Petition for Certiorari, p. 1.) In this regard, the United States Supreme Court's Rule 21 requires a Petition for Certiorari to include a statement of questions. It also provides that: "[o]nly the questions set forth in the petition or fairly included therein will be considered by the Court."

Even if the Court finds that this issue has been properly presented, it nevertheless should not grant the Petition for Certiorari based upon this claim since the California Appellate Court properly concluded that it was proper to allow these Trustees to review the case. In this case, the appellate panel conducted the review, but as is required by the Medical Staff bylaws, the entire Board of Trustees was responsible for the appellate review decision. (Medical Staff Bylaws, Petitioner's Exhibit C, Section 4, Appeal to the Board of Trustees, pp. C10-C12.)

As is noted above, the Board of Trustees considered whether some of its members could participate in the appellate review of Petitioner's third application, even though many of the Trustees had also participated in the review of his second application. The Board of Trustees concluded that this was necessary, since the composition of the Board "was not significantly different that it was . . . when [Petitioner's] second application was considered."

It was proper and necessary for the Board of Trustees to review and decide whether Petitioner was qualified for staff privileges at the time of his second application and again when he submitted a third application. Under the rule of necessity, which was referred to by this Court in *Aetna Life Insurance Co. v. LaVoie, supra,* 54 L.W. at p. 4385 (citing *United States v. Will,* 449 U.S. 200, 214, 101 S.Ct. 471, 66 L.Ed.2d 392 (1980)),

allegations of bias must sometimes give way when the allegation would effectively disqualify all of the judges. Applying this rule in the medical staff context, courts have rejected claims that a hospital governing body may be disqualified from acting as an appellate review body on the basis of prior participation in a matter. The courts have determined that it is improper to require withdrawal of board members for reasons of bias when this would make it impossible to decide the question of a physician's privileges as the board is the only body empowered under the bylaws to make such a decision. *Leonard v. Board of Directors, Prowers County Hospital District*, 673 P.2d 1019, 1023 (Colo. App. 1983). *See also Duffield v. Charleston Area Medical Center, Inc.*, 503 F.2d 512, 519 (4th Cir. 1974).

Petitioner's argument that the Board of Trustees did not need to act as the appellate review body requires the Court to ignore the clear language in the Medical Staff Bylaws which gives the entire Board the responsibility for reviewing medical staff peer review decisions. While the recusal of a few members might still leave the Board with a quorum that could decide the matter, the facts in the present case reflect that the Board of Trustees found that its composition had not changed significantly between the time of Petitioner's second application and his third application. Thus, the Board's finding of necessity was proper.

V

CONCLUSION

For each of the foregoing reasons, counsel for Respondent and Real Party in Interest respectfully urge this Court to Deny the Petition for Certiorari.

DATED: November 24, 1986

Respectfully submitted,

GIRARD, ELLINGSEN,
CHRISTENSEN & WEST

By: SUZANNE F. WEST

Attorneys for Respondent
and Real Party in Interest

APPENDIX A

San Antonio Community Hospital
Board of Trustees
Appellate Review Decision

In the matter of
Vinod C. Patwardhan, M.D.

SAN ANTONIO COMMUNITY HOSPITAL

This matter came before the Appellate Review Panel of the Board of Trustees of San Antonio Community Hospital for review and decision. At the request of Vinod C. Patwardhan, M.D., an appellate review hearing was conducted on March 21, 1983, to review the Judicial Review Committee decision dated February 15, 1983. The Judicial Review Committee recommended denial of Dr. Patwardhan's application for medical staff membership and clinical privileges.

The record considered by the Appellate Review Panel consists of the following:

A. Transcript of the Judicial Review Committee hearing which was held on November 15 and 23 and December 7, 1982 and January 11 and February 1, 1983 and all exhibits introduced into evidence at the hearing which were made a part of the hearing record;

B. The decision of the Judicial Review Committee dated February 15, 1983;

C. Dr. Patwardhan's request for appellate review dated February 26, 1983;

D. Letters dated March 9, 1983 from Mr. John L. Towers; March 12, 1983 from Dr. Patwardhan and March 15, 1983 from Mr. D. Mark Rankin, pertaining to the procedure for the appellate review.

The Appellate Review Panel consisted of the following members:

1. Mr. Dwight E. Bert
2. Mr. Rene Biane

3. Mr. Herschel Glenn
4. Mr. Robert Sherwood
5. Mr. Gordon A. Zwissler

Messrs. Zwissler, Sherwood and Biane indicated that they have been involved in the consideration of Dr. Patwardhan's second application to the hospital, but had not been previously involved in any phase of the consideration of the third application. Messrs. Bert and Glenn indicated that they had had no previous involvement at any phase of the consideration of any of Dr. Patwardhan's application. All members indicated that they had not prejudged this matter and had no bias which would prevent them from rendering an impartial decision on the evidence before them. Dr. Patwardhan objected to the participation of the Board of Trustees members who had considered his second application in the Appellate Review of the Judicial Review Committee's decision regarding his third application. However, the Appellate Panel concluded that it was proper to allow members who had been involved in the consideration of previous applications to participate in the appellate review, both at the Appellate Review Panel level and the Board level, since the composition of the Board is not significantly different than it was in January 1981, when Dr. Patwardhan's second application was considered. Thus, as a practical matter, the hospital's Board of Trustees necessarily includes members who considered Dr. Patwardhan's second application and this cannot invalidate the Board's authority to conduct an appellate review of the third application.

Dr. Patwardhan appeared personally at the Appellate Review hearing, apparently having chosen not to be represented by legal counsel. Edward B. Cavanaugh, M.D. and Vincent J. Carollo, M.D. appeared on behalf of the Credentials and Executive Committees. Suzanne F. West, Esq., presided as Hearing Officer.

After considering the entire record, the Appellate Review Panel, on March 21, 1983, unanimously adopted the following findings and conclusions:

FINDINGS:

1. After the Medical Executive Committee informed Dr. Patwardhan that it recommended denial of his application for medical staff membership and clinical privileges, Dr. Patwardhan made a timely request for a Judicial Review Committee hearing.

2. Dr. Patwardhan was given the notice of the charges on October 20, 1982 and the hearing was held on November 15 and 23 and December 7, 1982 and January 11 and February 1, 1983.

3. By letter dated February 15, 1983, Dr. Patwardhan was informed of the Judicial Review Committee's decision and he subsequently made a timely request for appellate review.

4. By letter dated March 9, 1983, Dr. Patwardhan was informed of the procedure to be used for the appellate hearing, including his rights to submit a written statement, to have twenty minutes to make an oral statement, and to be represented by legal counsel. By letter dated March 12, 1983, Dr. Patwardhan asked for unlimited time to present an oral statement. By letter dated March 15, 1983, Dr. Patwardhan was informed he would have only twenty minutes to present an oral statement, but that he could request a postponement of the appellate review hearing to allow him additional time to prepare a written statement. He chose not to request a postponement.

5. The Judicial Review Committee members had not been previously involved in any phase of the consideration of any of Dr. Patwardhan's medical staff applications, had no business or personal relationships which would affect their ability to render an impartial decision on the evidence and had not prejudged the matter. The Committee members conducted themselves properly during the hearing and their questions were appropriate.

6. The hearing officer, Mr. Miller, carried out his responsibilities in an impartial and proper manner.

7. Dr. Patwardhan was allowed to and did call three witnesses who testified on his behalf, introduced documentary evidence from other physicians and testified on his own behalf. The hearing officer properly instructed Dr. Patwardhan not to call witnesses who had no testimony to offer regarding the charges or whose testimony would be cumulative. In view of this

ruling, Dr. Patwardhan voluntarily chose not to call additional witnesses. Dr. Patwardhan was also given the opportunity to and did cross examine the witnesses against him.

8. Dr. Patwardhan was given copies of all the documents the Credentials and Executive Committees relied upon in formulating the charges and/or introduced at the hearing.

9. The evidence alleged to be hearsay evidence included portions of transcripts from the 1979 San Antonio Community Hospital Judicial Review Committee hearing and from the 1980 Pomona Valley Community Hospital Judicial Review Committee hearing. Dr. Patwardhan was given the opportunity to and did cross examine the witnesses at these hearings. This evidence also included reference letters and memorandums describing telephone conversations between Credentials Committee reresentatives and physicians who had worked with Dr. Patwardhan, which were submitted by the medical staff and letters from physicians describing their opinions of Dr. Patwardhan's conduct, which were submitted by Dr. Patwardhan.

10. Dr. Patwardhan's request to have an attorney represent him at the hearing was denied by the Judicial Review Committee. Although Dr. Patwardhan was informed several times, that he could be represented by another physician, he chose not to have such assistance. He did, however, have assistance in preparing for the hearing from an attorney.

11. The Credentials Committee interviewed Dr. Patwardhan twice, which gave him an opportunity to discuss his application before the Credentials and Executive Committees rendered their decisions.

12. The standard of review, as set forth in the Medical Staff Bylaws, Article IX, Section 3(k), requires an applicant to carry the burden of proving he is qualified for staff membership and to demonstrate, by a preponderance of the evidence, that the recommended denial of the application was arbitrary, unreasonable, or not sustained by the evidence.

13. The evidence presented at the Judicial Review Committee hearing supports each and every finding of the Judicial Review Committee set forth in its decision dated February 15, 1983. These findings are hereby adopted and incorporated

herein by reference. It also specifically supports a finding that incidents occuring many years ago remain relevant in view of the evidence which reflect that the problems have continued until the present time.

14. The evidence reflects that Dr. Patwardhan failed to demonstrate that the Judicial Review Committee's decision dated February 15, 1983, was arbitrary, unreasonable, or capricious.

CONCLUSIONS:

1. That the Judicial Review Committee hearing and Appellate Review hearing were conducted in accordance with the procedures required by the Medical Staff Bylaws and in accordance with law.

2. Dr. Patwardhan was given proper notice of the charges against him and of the Executive Committee's recommended denial of his medical staff application.

3. The appellate review was conducted in a proper manner and Dr. Patwardhan was given a full and fair opportunity to present his position.

4. The Judicial Review Committee members and hearing officer were properly selected and were not biased.

5. Dr. Patwardhan was given the opportunity to and did call witnesses, present evidence and cross-examine the witnesses against him.

6. Dr. Patwardhan was given, in a timely manner, copies of all the documents relied upon and presented at the hearing by the medical staff.

7. The parties were properly allowed to introduce all relevant evidence in support of their positions, including evidence which might otherwise be excluded by a court of law as hearsay evidence, as it met the Bylaws standard which allows introduction of such evidence if it is the type of evidence responsible persons customarily rely upon in the conduct of serious affairs. Also, the evidence of testimony from prior hearings does not constitute inadmissible hearsay since Dr. Patwardhan had had the opportunity to cross examine the witnesses.

8. It was proper not to allow Dr. Patwardhan to be represented by an attorney at the hearing.

9. The Credentials and Executive Committees' investigation was conducted in a proper manner.

10. The Bylaws appropriately place the burden of proof on Dr. Patwardhan to prove, by a preponderance of the evidence, that the recommended denial of his applicaton was arbitrary, unreasonable or not sustained by the evidence.

11. The evidence supports the conclusions of the Judicial Review Committee that Dr. Patwardhan engaged in a continuing pattern of misrepresentation, lack of candor and lack of forthrightness in his dealings with the hospital's medical staff, including the 1983 Judicial Review Committee and in dealings with the public and with other medical staffs; engaged in conduct reflecting very poor personal and professional judgment; and exhibited a poor level of medical skills, medical judgment and quality of case management. The conclusions of the Judicial Review Committee, as set forth in the February 15, 1983 decision are adopted in their entirety and are incorporated herein by reference.

12. The Judicial Review Committee's recommendations that Dr. Patwardhan's application for medical staff membership and clinical privileges should be denied is appropriate and responsive to the nature of the deficiencies in Dr. Patwardhan's professional conduct.

13. Dr. Patwardhan's application for medical staff membership and clinical privileges at San Antonio Community Hospital is hereby denied.

Dated: March 25, 1983

GORDON A. ZWISSLER
Chairman, Appellate Review Panel

Approved and adopted by the San Antonio Community Hospital Board of Trustees on March 28, 1983.

Dated: March 28, 1983

GORDON A. ZWISSLER
President, Board of Trustees

February 15, 1983

Medical Staff Executive Committee
San Antonio Community Hospital
999 San Bernardino Road
Upland, California 91786

SAN ANTONIO COMMUNITY HOSPITAL

Re: Decision and Report of Judicial
Review Committee —
Vinod C. Patwardham, M.D.

Gentlemen:

Commencing on November 15, 1982 at 7:00 p.m., and continuing on four additional evenings, concluding on Fedruary 1, 1983, the Judicial Review Committee, of which I am the Chairman, conducted a hearing requested by Dr. Vinod C. Patwardhan. The Judicial Review Committee heard evidence in support of the recommendation of the Executive Committee to reject Dr. Patwardhan's application for medical staff membership, as well as the evidence offered by Dr. Patwardhan in support of his position that his application should have been approved.

Dr. Patwardhan appeared personally and represented himself. Dr. E. B. Cavanaugh representing the Credentials Committee and Dr. V. J. Carollo representing the Executive Committee presented the Executive Committee's evidence. Jesse D. Miller, Esq. served as the Hearing Officer in accordance with the San Antonio Community Hospital Medical Staff Bylaws, and the hearing was conducted in accordance with said Bylaws.

The Judicial Review Committee originally consisted of the following staff physicians in addition to me as Chairman: S. D. Proffitt, M.D.; L. F. Potts, M.D.; M. J. Rosenthal, M.D.; J. D. Santaniello, M.D.; T. M. Barrett, M.D.; M. Kolber, M.D. and R. N. Fabricant, M.D. (alternate). During the course of the hearing, Drs. Proffitt, Santaniello and Potts excused themselves from the Committee, leaving five members of the Commit-

tee as required by the Bylaws. All five members remaining on the Committee were present at all times during the hearing and they were the only members who participated in the Committee's deliberations and who voted on this Decision.

During the hearing, all parties, including Drs. Patwardhan, Carollo and Cavanaugh agreed that this Decision and Report could be completed within fifteen (15) days of the conclusion of the hearing, rather than within five (5) days as otherwise would be required by the Bylaws.

Documentary evidence was introduced during the hearing by both parties. The Executive Committee introduced a booklet of "Medical Staff Representative Exhibits" numbered 1 through 28. Dr. Patwardhan introduced a booklet of "Exhibits of Vinod C. Patwardhan, M.D.," with documents under tabs lettered A through XYZ. In addition, Dr. V. C. Patwardhan offered a number of other Exhibits, all of which have been assigned letters and are attached to and made a part of the official transcript of the hearing prepared by Deanna Tunstall, Certified Shorthand Reporter.

In addition to the written evidence received at the hearing from both parties as described above, oral testimony was received from a number of witnesses on behalf of Dr. Patwardhan and on behalf of the Executive Committee. The testimony of these witnesses has also been transcribed and made a part of the official transcript by Ms. Tunstall.

Following the adjournment of the hearing, the five members remaining on the Judicial Review Committee met and came to a unanimous decision. That decision, and the reasons justifying that decision, are set forth below.

DECISION

The Judicial Review Committee, based upon all evidence presented at the hearing requested by Vinod C. Patwardhan, M.D., conducted between November 15, 1982 and February 1, 1983, has decided that the decision of the Executive Committee to recommend rejection (denial) of Dr. Patwardhan's application dated February 19, 1981, for staff membership, was

sustained by the evidence and under all the circumstances of this case was not arbitrary or unreasonable.

STATEMENT OF REASONS

On February 19, 1981, Dr. Patwardhan applied for medical staff membership at San Antonio Community Hospital. On September 22, 1982, he was notified in writing of the recommendation of the Executive Committee that his application be rejected. He was also notified in the September 22, 1982 letter of his right to request a hearing by a Judicial Review Committee.

Dr. Patwardhan requested such hearing by a letter from his attorney, John Chakmak, received by the Hospital on October 5, 1982. By letter of October 20, 1982, Dr. Patwardhan was notified of the hearing date and was given written notice of the reasons for the Executive Committee's decision. These reasons and the evidence in support thereof and opposition thereto were reviewed by the Judicial Review Committee in this hearing. In its deliberations, this Committee was particularly mindful of that portion of Article VIII, Section 2j, which reads as follows:

> "In all cases in which a hearing is conducted under this Article, after all the evidence has been submitted on both sides, the Judicial Review Committee shall rule against the person who requested the hearing unless it finds that said person has proved, by a preponderance of the evidence, that the action of the committee or body whose decision prompted the hearing was arbitrary, unreasonable, or not sustained by the evidence."

The reasons stated by the Executive Committee consist of four main categories:

> 1. "Continuing pattern of misrepresentation/lack of candor/lack of forthrightness in dealings with the Medical Staff of San Antonio Community Hospital. . . ."
>
> 2. "Misrepresentation/lack of candor/lack of forthrightness in dealings with the public and with other medical staffs. . . ."

3. "Conduct calling into serious question the level and quality of . . . [Dr. Patwardhan's] personal and professional judgment. . . ."

4. "Information calling into serious question. . . .

[Dr. Patwardhan's] level of medical skills, medical judgment and quality of case management. . . ."

These reasons (or charges) will be considered one by one.

1. "Continuing pattern of misrepresentation/lack of candor/lack of forthrightness in dealings wih the Medical Staff of San Antonio Community Hospital. . . ."

The Judicial Review Committee finds that this reason (or charge) was sustained by the evidence, and was not arbitrary or unreasonable. This reason (or charge) relates to Dr. Patwardhan's dealings with this Hospital.

There is evidence that in his 1976 Medical Staff Application, in statements made to the Credentials Committee and in testimony at a 1979 Judicial Review Committee hearing (all at San Antonio Community Hospital) that Dr. Patwardhan misrepresented certain facts.

For example, he stated that he was on the faculty of the Department of Medicine at Loma Linda University. Letters from that institution state unequivocally that he was never on that faculty. Even Dr. Patwardhan admitted that he had falsely represented such faculty position on an applicaton to this Hospital, and elsewhere.

Another example, of a lack of candor or misrepresentation concerned his relations with Maimonides Medical Center in Brooklyn. Dr. Patwardhan had claimed that he had not had any problems with Maimonides and that he had been offered a staff appointment there. Correspondence from that institution indicates that Dr. Patwardhan's performance there was unsatisfactory, that Dr. Patwardhan had never been offered a staff appointment there and further that Dr. Patwardhan's application for an additional year of fellowship in Oncology had been refused.

The evidence indicated that Dr. Patwardhan had made similar misstatements on applications to Pomona Valley Commu-

nity Hospital and to a Judicial Review Committee of that hospital.

The evidence indicated that Dr. Patwardhan has dealt with this Hospital with a lack of forthrightness and candor in the past and many of his own statements and admissions at this Judicial Review Committee confirm a continuing pattern in this regard.

> 2. "Misrepresentation/lack of candor/lack of forthrightness in dealings with the public and with other medical staffs . . . ."

The Judicial Review Committee finds that this reason (or charge) was sustained by the evidence, and was not arbitrary or unreasonable. This reason (or charge) relates to Dr. Patwardhan's dealings with the public and other hospitals.

There is evidence that Dr. Patwardhan misrepresented his credentials in "flyers" promoting his speaking engagements at a 1976 Chaffey College lecture and at a 1976 Doctors' Hospital of Montclair lecture. There is also evidence of misrepresentation of his credentials on a 1976 Medical Staff Application to Pomona Valley Community Hospital.

> 3. "Conduct calling into serious question the level and quality of . . . [Dr. Patwardhan's] personal and professional judgment. . . ."

The Judicial Review Committee finds that this reason (or charge) was sustained by the evidence, and was not arbitrary or unreasonable. This reason (or charge) relates to the level and quality of Dr. Patwardhan's personal and professional judgment.

The evidence, in the opinion of this Committee, not only calls Dr. Patwardhan's judgment into "serious question" but demonstrates very poor judgment, sufficient to deny him staff privileges.

The evidence is clear (and it is admitted by Dr. Patwardhan) that in order to coerce a licensed vocational nurse, not legally authorized to do so, to administer intravenous therapy, Dr. Patwardhan instructed the husband (a layman) of a critically ill patient to administer said intravenous therapy.

The evidence is also clear, and admitted by Dr. Patwardhan, that he engaged in a "hunger strike" on the premises (and later in close proximity to the premises) of San Antonio Community Hospital for about 9 days. There is evidence that this interfered with the administration of this Hospital and required police assistance to remove him from the premises. Even Dr. Patwardhan admitted that this conduct was inappropriate and unprofessional. This Committee does not philosophically oppose Dr. Patwardhan's right to protest as he sees fit, but doing so at this "location" seems a serious error in judgment.

There is also evidence that Dr. Patwardhan permitted a non-professional employee to give intravenous chemotherapy, even though that employee was neither formally trained nor licensed to do so. Dr. Patwardhan admits these facts. This Committee concludes that whether or not this conduct is a violation of law, it is poor professional judgment.

> 4. "Information calling into serious question . . . [Dr. Patwardhan's] level of medical skill, medical judgment and quality of case management. . . ."

The Judicial Review Committee finds that this reason (or charge) was sustained by the evidence, and was not arbitrary or unreasonable. This reason (or charge) relates to Dr. Patwardhan's medical skills, medical judgment and quality of case management.

There is evidence of dissatisfaction with Dr. Patwardhan's medical knowledge, medical judgment and medical performance at his former training and employment facilities. These consist of letters, memos of interviews and proctor reports. There is evidence to sustain a finding of case mismanagement of a hysterectomy patient at Doctors' Hospital of Montclair in 1977, and of a leukemia patient at Doctors' Hospital in Montclair in 1979. There is further evidence to sustain a finding of mismanagement of three specific patients (Charts No. 1064105, 1071189 and 1065718-7) at Pomona Valley Community Hospital. These involve inadequate history and physical, failure to initiate proper diagnostic studies and inadequate treatment of patients.

Based upon all of the foregoing, the Judicial Review Committee unanimously decided that the recommendation of the Executive Committee to reject Dr. Patwardhan's Medical Staff Application is not arbitrary or unreasonable and is sustained by the evidence.

Very truly yours,

ALAN G. MCPHERSON, M.D.
Chairman, Judicial
Review Committee

/jt
cc: Board of Trustees
Vinod C. Patwardhan, M.D. —
Certified Mail #P314766789

PROOF OF SERVICE BY MAIL

I am a citizen of the United States and a resident of the City and County of Los Angeles; I am over the age of eighteen years and not a party to the within action; my business address is: 1706 Maple Avenue, Los Angeles, California.

On November 24, 1986, I served the within Brief in Opposition to Petition for a Writ of Certiorari in re: "Vinod C. Patwardhan vs. San Antonio Community Hospital" in the United States Supreme Court, October Term, 1985, No. 85-1931;

on the Parties in said action, by placing three copies thereof enclosed in a sealed envelope with postage fully prepaid, in the United States post office mail box at Los Angeles, California, addressed as follows:

Lawrence Silver, Esq.
Wilshire-Doheny Plaza, West Tower
9100 Wilshire Blvd., Ste. 360
Beverly Hills, CA 90212

All parties required to be served have been served.

I certify (or declare), under penalty of perjury, that the foregoing is true and correct.

Executed on November 24, 1986, at Los Angeles, California

Ce Ce Medina

CE CE MEDINA

Subscribed and Sworn to before me this 24th day of November, 1986.

My Commission Expires October 27, 1990.

June A Mason

Notary Public

OFFICIAL SEAL
JUNE A MASON
NOTARY PUBLIC - CALIFORNIA
LOS ANGELES COUNTY
My comm. expires OCT 27, 1990